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UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GERALD A. DELEMUS,

Defendant.

Case No.: 2:16-cr-00046-GMN-PAL

**DEFENDANT GERALD A . DELEMUS
MOTION TO SEVER**

Certification: This Motion is timely filed.

Defendant GERALD DELEMUS, through his counsel, BRIAN J. SMITH, ESQ., moves to sever his trial from the trial of his co-defendants, as it is anticipated: (1) a joint trial will violate DELEMUS'S Six Amendment right to confront witnesses against him; (2) a joint trial will violate DELEMUS'S Fifth Amendment right to due process; and (3) at a joint trial, one or more co-defendants will present a mutually exclusive and/or impermissibly antagonistic defense to the anticipated trial defense of DELEMUS. The attached Memorandum of Points and Authorities is submitted in support of this request.

DATED this 27th day of June, 2016.

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/s/ Brian J. Smith
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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant GERALD DELEMUS and 18 co-defendants are charged in a 16-count superseding indictment that includes four forfeiture allegations. ECF No. #27. The charges stem from an alleged standoff with law enforcement agents near Bunkerville, Nevada in April 2014. *Id.* Not all of the co-defendants are charged in each count. This case is scheduled to go to trial in February of 2017.

The Court has ordered that this severance motion be filed by June 27, 2016. At present, however, DELEMUS cannot state with particularity the grounds necessitating severance, as:

- (1) the discovery produced to date is voluminous and defense counsel has not had the ability to review and analyze for purposes of identifying *Bruton*¹ issues and mutually exclusive and/or impermissibly antagonistic defenses between DELEMUS and his co-defendants;
- (2) the government has not disclosed all of the relevant discovery to the defense; and;
- (3) the government has not yet identified which of the co-defendants' statements, if any, it intends to introduce at trial.

Nonetheless, due to the nature of the charges, the number of co-defendants, and the type of discovery that has been disclosed, it is anticipated the discovery may reveal that Mr. DELEMUS'S co-defendants have made statements against his interests---- statements that may implicate *Bruton* and his Sixth Amendment right to confrontation. It is

¹ *Bruton v. United States*, 391 U.S. 123 (1968)

1 further anticipated that one or more co-defendants' trial defenses may be mutually
2 exclusive to the anticipated trial defense of DELEMUS.²

3 This severance request is therefore submitted to comply with the Court's filing
4 deadline and to set forth the legal grounds upon which a severance may be granted. It
5 will be necessary for DELEMUS to supplement this Motion when the defense completes
6 its review and analysis of the entirety of the discovery in this case. Thus, DELEMUS
7 respectfully requests the opportunity to supplement this Motion.
8

9 **A. The Trial of DELEMUS May Need to Be Severed From the Trial of His Co-**
10 **Defendants Pursuant to *Bruton*, The Sixth Amendment's Confrontation**
11 **Clause, and the Fifth Amendment's Due Process Clause.**

12 The Supreme Court held in *Bruton v. United States* that admission of a co-
13 defendant's confession that implicated defendant Bruton at a joint trial constituted
14 prejudicial error, even though the trial court gave clear instructions to the jury to disregard
15 the inadmissible hearsay inculcating Bruton, 391 U.S. at 123, 136-37 (1968). The
16 Supreme Court reversed Bruton's conviction because the admission of his co-defendant's
17 statement against him violated Bruton's Sixth Amendment right to confrontation and the
18 opportunity to cross-examine witnesses against him. *Id* at 126.
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20 In *Richardson v. Marsh*, the Supreme Court held the *Bruton* rule applies to
21 confessions of non-testifying co-defendants that are facially incriminating to another co-
22 defendant. 481 U.S. 200, 201 (1987). Additionally, in *Gray v. Maryland*, the Supreme
23 Court held a co-defendant's statements that are redacted to exclude explicit references to
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27 ² There are, upon information and belief, several hundred thousand pages taken from the social
28 media accounts of the co-defendants in this case. Therefore, it is impossible to ascertain what, if
anything, the co-defendants may have said regarding Mr. DELEMUS.

1 another co-defendant are forbidden at a joint trial if the redaction is done in such a way as
2 to make the identity of the omitted person obvious to the jury. 523 U.S. 195, 192 (1998).

3 A joint trial in which DELEMUS is tried along with one or more co-defendants may
4 give rise to violations of DELEMUS'S Sixth Amendment constitutional to confrontation
5 and to cross-examine witnesses against him. The Federal Rules of Criminal Procedure
6 allow the joint trial of defendants. See Fed. R. Crim. P. 8, 14. However, a defendant's
7 constitutional confrontation rights trump the government's right to insist on such joinder
8 when the "defendant may be prejudiced by the admission in evidence against a co-
9 defendant of a statement or confession made by that co-defendant. This prejudice cannot
10 be dispelled by cross-examination if the co-defendant does not take the stand," and
11 "[l]imiting instructions to the jury may not in fact erase the prejudice." *Bruton*, 391 U.S. at
12 132 (quoting Fed. R. Crim. P. 14 advisory committee's notes).

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15 Once the government complies with its discovery obligations and identifies what
16 inculpatory statements co-defendants are alleged to have made against DELEMUS, the
17 defense will be able to discern whether any of those statements require severance. Such
18 statements would unduly prejudice DELEMUS in the eyes of the jury if presented at trial
19 and if the co-defendant who made the respective statement does not testify at trial.

20 Spillover is also a viable threat in this case. Spillover exists when evidence against
21 one co-defendant enables transference of guilt to another co-defendant. See *Kotteakos v.*
22 *United States*, 328 U.S. 750, 744 (1946) ("The dangers for transference of guilt from one
23 to another across the line separating conspiracies, subconsciously or otherwise, are so
24 great that no one really can say prejudice to substantial right has not taken place.").
25 Spillover implicates DELEMUS' Fifth Amendment due process rights. See *Spencer v.*
26 *Texas*, 385 U.S. 554, 563-64 (1967) ("[T]he Due Process Clause guarantees the
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28

1 fundamental elements of fairness in a criminal trial.”) *cf. United States v. Bruno*, 383 F.3d
2 65, 91 (2d Cir. 2004) (recognizing spillover effect that warranted vacated of counts other
3 Than those primarily infected with error.

4 In complex cases, the jury may not be able to compartmentalize evidence offered
5 against the respective co-defendants. The Ninth Circuit has stated that, “[w]hile a great
6 disparity in proofs may be sufficient to allow a severance in certain cases, the prime
7 consideration is whether the jury can reasonably be expected to compartmentalize the
8 evidence as it relates to separate defendants in the light of its volume and the limited
9 admissibility.” *United States v. Monks*, 774 F.2d 945, 949 (9th Cir. 1985) (internal
10 quotation marks and citation omitted).

12 Here, not all co-defendants are named in each count. The government’s proof at
13 trial will therefore not be identical for each co-defendant. Compounding these issues is
14 the possible admission of a co-defendant’s statements against other co-defendant. The
15 jury would therefore be asked to separately consider evidence the government presents
16 for each of the 16 counts against the respectively named co-defendants and, possibly, be
17 asked to consider statements co-defendants made against each other only against
18 certain co-defendants and not others. The onerous and confusing nature of such tasks
19 would unduly prejudice DELEMUS and deny him his Fifth Amendment right to a fair trial.
20 See *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986) (misjoinder constitutes a
21 constitutional violation “if it results in prejudice so great as to deny a defendant his Fifth
22 Amendment right to a fair trial.”).

25 For these reasons, DELEMUS requests the Court to allow him to supplement this
26 Motion, once the defense has completed its discovery review, to identify for the Court
27 evidence that supports severance of DELEMUS’S trial from that of his co-defendants.
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B. DELEMUS May Present a Mutually Exclusive Defense to that of His Co-Defendants.

Rule 14 of the Federal Rules of Criminal Procedure gives trial courts broad discretion to order severance if it appears that a defendant is prejudiced by a joinder of the parties even if the joinder is technically proper under Rule 8. Fed. R. Crim. P. 14; see *Zafiro v. United States*, 506 U.S. 534, 541 (1993). Thus, courts should grant a defendant's motion for severance when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt[] or innocence." *United States v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001) (quoting *Zafiro v. United States*, 506 U.S. 524, 538-39 (1993)); see also Fed. R. Crim. P. 14(a) (permitting relief from joinder).

A joint trial is not permitted when co-defendants present inconsistent or conflicting defenses, often referred to as mutually exclusive defenses. *Angwin*, 271 F.3d at 795; *United States v. Tootick*, 952 F.2d 1078, 1080-82 (9th Cir. 1991). This is because, when co-defendants present mutually exclusive defenses, the jury often cannot assess the guilt or innocence of the co-defendants on an individual and independent basis. *Tootick*, 952 F.2d at 1082. And, "[co-defendants] who accuse each other bring the effect of a second prosecutor into the case with respect to their co-defendant... [c]ross examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant...[c]losing arguments allow a final opening for co-defendant's counsel to portray the other defendant as the sole perpetrator of the crime." *Id.*

DELEMUS proffers at this time that his defense at trial will be that of innocence. **Moreover, it is critical to the defense that one of the most salient facts in favor of DELEMUS'S defense is the fact that he did not arrive at the location of the alleged**

1 **standoff until after it was over.**³ However, in light of the volume of discovery, the
2 presence of co-defendants, and the present inability to ascertain whether the co-
3 defendants' defenses will be mutually exclusive or impermissibly antagonistic to his,
4 DELEMUS raises this possible severance ground in an abundance of caution and for
5 purposes of preserving this issue for future review by this Court. DELEMUS requests the
6 Court to allow him to supplement this Motion, once the defense has completed its
7 discovery review, and identify for the Court evidence that supports severance of
8 DELEMUS'S trial from that of his co-defendants.
9

10 **C. Conclusion**

11 Due to the complex and extensive nature of the allegations in this case, it may be
12 necessary to sever DELEMUS'S trial from that of his co-defendants to preserve
13 DELEMUS'S constitutional rights. DELEMUS, with the Court's permission, will
14 supplement arguments in support of severance once the government satisfies its
15 statutory and constitutional discovery obligations and DELEMUS has an opportunity to
16 review that discovery.
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18
19 DATED this 27th day of June, 2016.

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27

28 ³ DeLemus arrived in Bunkerville, Nevada in the early morning hours of April 13, 2014. This was after the so-called standoff had ended.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Law Office of BRIAN J. SMITH, LTD., and is a person of such age and discretion as to be competent to serve papers. That on June 27, 2016, she served an electronic copy of the above and foregoing **DEFENDANT GERALD A. DELEMUS MOTION TO SEVER**, by electronic service (ECF) to the persons named below and via United States Postal Service, first class mail, to the defendant:

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